

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND COMPOUNDING ) MDL NO. 13-02419-RWZ  
PHARMACY CASES LITIGATION )

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BEFORE: THE HONORABLE RYA W. ZOBEL AND  
THE HONORABLE JENNIFER C. BOAL

**STATUS CONFERENCE**

John Joseph Moakley United States Courthouse  
Courtroom No. 17  
One Courthouse Way  
Boston, MA 02210

August 7, 2014  
2:30 p.m.

Catherine A. Handel, RPR-CM, CRR  
Official Court Reporter  
John Joseph Moakley United States Courthouse  
One Courthouse Way, Room 5205  
Boston, MA 02210  
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1           FOR PAUL D. MOORE, IN HIS CAPACITY AS CHAPTER 11 TRUSTEE OF  
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## P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Rya W. Zobel, United States District Court Judge, and the Honorable Jennifer C. Boal, Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on August 7, 2014.)

THE COURT: All right. Some of you inadvertently wandered into a sentencing. It was interesting, wasn't it?

MR. COREN: Yes, it was.

THE COURT: Sad, too.

In any event, Magistrate Judge Boal has joined me today and I think it helps her to be participating in these conferences and she will get a large part of the work that needs to be done by the time we finish here today.

So, let me start by reviewing who is here. Mr. Sobol?

MS. PARKER: Mr. Sobol is participating by phone today, your Honor.

THE COURT: Well, Mr. Sobol, are you there?

MR. SOBOL: Yes, I am.

THE COURT: You're barely there.

COURTROOM DEPUTY CLERK URSO: Judge, I turned it down a little bit.

THE COURT: It's okay. Ms. Johnson?

1 MS. JOHNSON: Yes, your Honor.

2 THE COURT: Mr. Gastel?

3 MR. STRANCH: He actually had a baby this morning at  
4 2:00 a.m.

5 THE COURT: He did?

6 MR. STRANCH: Yes. It's amazing.

7 THE COURT: So, Mr. Stranch.

8 MR. STRANCH: That's correct, your Honor. Good  
9 afternoon.

10 THE COURT: And let's see. Mr. Clayton -- no.

11 MR. CHALOS: No. Mark Chalos, your Honor.

12 THE COURT: Mr. --

13 MR. FENNEL: Patrick Fennell, Plaintiffs' Steering  
14 Committee.

15 THE COURT: And over here on my right Mr. -- I'm  
16 sorry?

17 MR. FERN: Mr. Fern, your Honor, from Harris Beach.

18 THE COURT: Fern?

19 MR. FERN: Fern, F-e-r-n. Good afternoon, your  
20 Honor, Judges.

21 THE COURT: By the time we finish with this case, I  
22 will know you all from one meeting to the next.

23 And you are?

24 MR. RABINOVITZ: Dan Rabinovitz For MSN.

25 MR. GAYNOR: Robert Gaynor, your Honor.

1 THE COURT: I'm sorry?

2 MR. GAYNOR: For the individuals.

3 THE COURT: Your name?

4 MR. GAYNOR: Gaynor.

5 THE COURT: Gaynor.

6 MR. KLARFELD: Good afternoon, your Honor. Joshua  
7 Klarfeld for GDC.

8 MR. MORIARTY: Matthew Moriarty for Ameridose.

9 THE COURT: In the back.

10 MR. BUSCH: Stephen Busch for Insight Health Corp.  
11 Good afternoon, your Honor.

12 THE COURT: And Mr. Gottfried?

13 MR. COREN: I'm Michael Coren, co-chair of the  
14 Official Creditors' Committee.

15 MR. MOLTON: Your Honor, David Molton, counsel to the  
16 Official Creditors' Committee.

17 THE COURT: Now Mr. Gottfried.

18 MR. GOTTFRIED: Thank you, your Honor.

19 MR. ELLIS: And Rick Ellis for plaintiffs, your  
20 Honor.

21 THE COURT: Anybody else I need to know? Oh, Mr.  
22 Rehnquist and Mr. Braceras.

23 MR. REHNQUIST: Good afternoon, your Honor.

24 THE COURT: I'm sorry?

25 MR. REHNQUIST: Yes, for UniFirst. Good afternoon.



1 THE COURT: Right. That's it.

2 Okay. Ms. Johnson, will you please proceed as you  
3 usually do.

4 MS. JOHNSON: Thank you, your Honor.

5 We'll start with agenda Item No. 1, which is the  
6 status of mediation efforts. As to the following list,  
7 mediation is ongoing:

8 ARL, which is the testing company. Victory, which is  
9 an HVAC --

10 THE COURT: ARL is the one that had opted out the  
11 last report and has now come back in again?

12 MS. JOHNSON: No, your Honor. At the last status  
13 conference we reported that Liberty had opted out. Liberty is  
14 still out of mediation.

15 THE COURT: Can we do anything to get them back in  
16 again?

17 MR. HERMES: Your Honor, Peter Hermes for Liberty.  
18 Somebody needs to say, "Yes."

19 THE COURT: Well, I thought the object of the  
20 mediation was to get to, "Yes."

21 MR. HERMES: A lot of people have said, "Yes" and one  
22 person has not said, "Yes" as yet, your Honor.

23 THE COURT: Well, what can we do?

24 MR. HERMES: He has to change his mind, your Honor.  
25 I can't say anything further about the mediation, I don't

1 believe.

2 MS. JOHNSON: Because of --

3 THE COURT: Well, should we ask him to come in here?

4 MS. JOHNSON: Your Honor, at this time I believe that  
5 efforts are being made to attempt to resolve that issue and to  
6 bring Liberty back into the mediation to reach a successful  
7 resolution. Because of the mediation privilege, I'm not  
8 willing to go beyond what Mr. Hermes has said, but we are  
9 trying to work on that.

10 THE COURT: But if there is an issue, maybe they  
11 should be invited to come to the next conference.

12 MS. JOHNSON: We appreciate that, your Honor, and  
13 will take that into consideration.

14 Yes. So, mediation is ongoing with respect to the  
15 following entities, your Honor:

16 ARL; Victory; Insight, which is a Virginia pain  
17 clinic; Inspira, which is a New Jersey pain clinic.

18 And good news, UniFirst, the remaining national  
19 defendant, has agreed to try to mediate and we're looking at  
20 dates in October for that.

21 And bad news, a Florida clinic has since the last  
22 status conference opted out of the mediation program. We  
23 understand that is a result of an effort to mediate that was  
24 unsuccessful. We understand that there are other Florida  
25 entities who may or may not opt out following that effort.

1 MR. COREN: Your Honor, Mike Coren, one of the  
2 co-chairs.

3 Actually, there's a little bit more good news.

4 COURTROOM DEPUTY CLERK URSO: Can you speak into the  
5 microphone, please?

6 THE COURT: We all need to do this sitting down  
7 because the microphones don't reach.

8 MR. COREN: Thank you, your Honor. As I started to  
9 say, Mike Coren, co-chair of the creditors' committee.

10 There's somewhat more good news in that we're pleased  
11 to report that as a result of the mediation conducted by  
12 Professor Green, defendant Inspira Health, the trustee, the  
13 Official Creditors' Committee, PSC, have reached a settlement  
14 agreement in principle. The settlement will be implemented as  
15 part of the Chapter 11 bankruptcy plan, if and when approved.  
16 The parties are in the process of trying to reach settlement  
17 agreement.

18 THE COURT: Inspira is New Jersey?

19 MR. COREN: That is correct, your Honor. It was one  
20 of the large healthcare regional facilities there.

21 I must say, we must commend Professor Green for his  
22 able mediation over two days bringing the parties together.  
23 He should be applauded and we thank him.

24 THE COURT: Okay. Anything else, Ms. Johnson, with  
25 respect to your Item 1?

1 MS. JOHNSON: Mr. Sobol may wish to be heard on that,  
2 your Honor. I'm not sure.

3 THE COURT: I'm sorry, who wishes to be heard?

4 MS. JOHNSON: Mr. Sobol, by phone.

5 THE COURT: Mr. Sobol?

6 MR. SOBOL: Yes. Good afternoon, your Honor.

7 All the reports that have been provided to you are  
8 essentially correct. The mediations are all at different  
9 stages and I simply want to be a little bit cautious and not  
10 over-promise and under-deliver.

11 There are one or two or three that are at various  
12 stages and the parties are hopeful that there will be  
13 resolution in the next few weeks, including Inspira, but,  
14 again, I just want to make sure that we don't over-promise.

15 We're having some issues in some other ones that we  
16 thought had progressed very far and we're continuing to work  
17 on them. The long and short of it is, I think that shortly  
18 after Labor Day, we should all have a very good sense where we  
19 are with all of these things. I don't want to over-promise.  
20 That's all.

21 THE COURT: Well, maybe we can have a celebratory  
22 meeting in September.

23 MR. SOBOL: That would be wonderful. I'll even come  
24 to you in person that time.

25 THE COURT: Wonderful. Okay.

1           So, that's it, Ms. Johnson?

2           MS. JOHNSON: Yes, your Honor. I think that takes us  
3 to Item No. 2.

4           THE COURT: Right.

5           MS. JOHNSON: The status of the insurance declaratory  
6 judgment actions. There are two declaratory judgment actions  
7 pending before Judge Saylor that deal with insurance policies  
8 issued to affiliated defendant Ameridose. There is a status  
9 conference in those actions scheduled for September 11th.  
10 Those actions are currently stayed.

11           There is also a declaratory judgment involving  
12 Liberty that is pending in the District of Connecticut. I  
13 don't know that that has been brought to the Court's attention  
14 before. So, we just mention it, and no further report.

15           THE COURT: Now -- do you have more?

16           MS. JOHNSON: I do not, your Honor.

17           THE COURT: Okay. Item 3 is the status of discovery,  
18 and I will refer everything in Item 3 to Magistrate Judge  
19 Boal, who has been handling these matters before. She's  
20 familiar with them and she will do it with great dispatch.  
21 That brings us down --

22           MR. GOTTFRIED: Your Honor --

23           MS. JOHNSON: If I could, your Honor, we fully  
24 appreciate and approve and have no problem with Judge Boal  
25 handling discovery matters as a general matter.

1           There are, I believe, three issues in front of you  
2           that may look like discovery issues, but may be something that  
3           the Court would like to address. They relate to defendant  
4           Insight.

5           THE COURT: Yes, I have those. That was number --  
6           it's a different number.

7           MS. JOHNSON: No. 12, your Honor.

8           THE COURT: No. 11. There's an 11 -- no.

9           MS. JOHNSON: It would be No. 12 on Page 4.

10          THE COURT: Yes, 12.

11          MS. JOHNSON: I understand that Mr. Fennell may wish  
12          to be heard for the Plaintiffs' Steering Committee and that  
13          Mr. Busch may wish to be heard on that for defendant Insight,  
14          whether now or later.

15          THE COURT: Why don't we do that when we get there in  
16          the order. Okay. So, Item 3 all goes to Judge Boal.

17          MR. GOTTFRIED: Your Honor, Attorney Gottfried for  
18          the trustee.

19          Sort of similar to what Ms. Johnson said, the motion  
20          for stay may strike the Court facially as being about  
21          discovery, but really goes to the implementation of the  
22          settlements that were approved by Judge Boroff last Friday.  
23          There's issues in that motion that go to whether dispositive  
24          motions can be filed, the type of pre-judgment security people  
25          can go, and I think, as indicated on the agenda, the trustee

1 is prepared to draft that motion and circulate and receive  
2 comments from the affiliated defendants in hopes to get that  
3 draft to the PSC and the Official Creditors' Committee,  
4 hopefully, by tomorrow. We are supposed to file it within ten  
5 business days of the date of the settlement. That may be  
6 something that, when you see it, is more appropriate because  
7 it really relates to the implementation of the settlement than  
8 the interplay with the bankruptcy court for this Court to  
9 keep. Obviously, whatever you decide is fine, but I wanted to  
10 bring that to your attention, that it's really more about  
11 implementation of the settlement than a pure discovery issue.

12 MR. MOLTON: Your Honor, David Molton, for the  
13 Creditors' Committee.

14 What Mr. Gottfried said is true. That motion is part  
15 of Insight's settlement agreement approved by Judge Boroff  
16 where the orders came back in the past week. I think they're  
17 integral for proceeding with the plan and, accordingly, we  
18 would agree with Mr. Gottfried and support his requests that,  
19 at least for the present time, that stays with your Honor.

20 THE COURT: Are there any matters pending with  
21 respect to that at the moment?

22 MR. SOBOL: If I may, your Honor.

23 THE COURT: Oh, Mr. Sobol, is that you?

24 MR. SOBOL: Yes.

25 THE COURT: Okay.

1 MR. SOBOL: There are no particular matters pending  
2 with respect to the so-called stay motion that will be filed  
3 shortly, but under the assumption that the stay motion tracks  
4 the language of the underlying settlement agreements with the  
5 insiders, I believe that all parties expect that that motion  
6 will be functionally assented to --

7 THE COURT: Well, that's what I thought.

8 MR. SOBOL: -- non-participants that might want to  
9 chime in, but I think that you -- once the motion is filed and  
10 the objection period expires, there are no objections that  
11 will be ripe to be ruled upon.

12 MR. GOTTFRIED: That certainly would be the trustee's  
13 hope, that it would be essentially accented to since the PSC  
14 and the Creditors' Committee's reported --

15 THE COURT: Well, when I said that all of the items  
16 under Paragraph 3 go to Judge Boal, which of the items are  
17 what you're now referring to as pertaining to the settlement?

18 MR. MOLTON: Your Honor, 3(a)(iii) on Page 1 is the  
19 one. And this is David Molton for those on the --

20 THE COURT: Well, let's wait and see. If it's agreed  
21 on, then it's not an issue. If it's not agreed on, then I  
22 will decide whether Judge Boal or I will do it, okay?

23 MR. GOTTFRIED: Understood, your Honor.

24 THE COURT: All right. Now, No. 4, status of the  
25 litigation track. We had agreed earlier that we would have a



1 conference, you know, another conference, I think on September  
2 18th and not October 30. I would propose that any motions  
3 that are ripe at that point we hear on September 17th. So  
4 that we do what we did the last time, have a hearing on  
5 motions separate and apart from these up-to-date notices of  
6 what's going on, and we could do it on September 17th, at 2  
7 o'clock. Is that right, Lisa?

8 COURTROOM DEPUTY CLERK URSO: Yes.

9 THE COURT: That seemed to be okay.

10 COURTROOM DEPUTY CLERK URSO: I thought we were going  
11 to do --

12 THE COURT: The conference on the 18th.

13 COURTROOM DEPUTY CLERK URSO: Yes. I thought --

14 THE COURT: And motions on the 17th.

15 COURTROOM DEPUTY CLERK URSO: I thought it was in  
16 October we were going to do the motions.

17 THE COURT: No. October 17th --

18 COURTROOM DEPUTY CLERK URSO: We have a sentencing  
19 and a motion hearing on the 17th.

20 THE COURT: Well, my calendar was totally empty. So,  
21 that's why I choose the 17th, but I think it makes sense  
22 because people who come from out of town don't want to have to  
23 spend an extra day. So, we'll just work it out. We'll do it  
24 on September 17th, at 2:00, and I'll deal with these other  
25 matters separately. That, I think, covers No. 4.

1           Status of the bankruptcy. Is there anything other  
2           than the fact that we now have a settlement agreement?

3           MR. GOTTFRIED: I think that is, obviously, the  
4           single most important report, which is that the settlement was  
5           approved by Judge Boroff last Friday.

6           THE COURT: However, this item on the agenda has a  
7           bunch of other things, like Liberty and UniFirst and Tennessee  
8           Clinic.

9           MR. GOTTFRIED: That relates to -- I'll be happy to  
10          address that, your Honor. What that relates to is the  
11          trustee's notice regarding further relief from the  
12          preservation order.

13          To give the Court a brief background, Judge Saylor  
14          originally entered an order preserving all evidence at the  
15          beginning of the case before the bankruptcy was filed. The  
16          trustee back on May 13th of 2013 filed a motion for relief  
17          from the preservation order, at that time focused principally  
18          on being able to return leased equipment so he would not have  
19          to continue to pay the cost of leasing.

20          The filing of that motion resulted in the dialogue  
21          between the U.S. Attorney's Office and the trustee, whereby  
22          not only did they agree to a joint order with respect to the  
23          leased equipment, but they also agreed to a protocol whereby  
24          the trustee could in the future seek to dispose of additional  
25          property, ultimately give up the premises, and move forward in

1 that way.

2 That order was entered by Judge Saylor and then  
3 pursuant to that order, back on June 5th, the trustee filed  
4 the notice that that order required to allow him to  
5 essentially vacate the premises and dispose of the remaining  
6 equipment in the premises, and the reason for that is many  
7 fold.

8 Some of the equipment may have value and could  
9 provide a value to the estate. For example, there's a crimper  
10 there that has never been taken out of shrink wrap that may  
11 have substantial value. There's also expense in maintaining  
12 the property. It needs to be heated. It needs to be insured.  
13 There's a security system, things of that nature that run  
14 monthly substantial expenses for the estate.

15 So, at this point where we're more than two years  
16 after the fact, our view was that there literally is no  
17 evidentiary value to anything that was left in the premises.  
18 We have, as we've indicated in our papers, preserved what we  
19 believe are the relevant ESI and documents. Mr. Fern's office  
20 has done that. We think it's time to, essentially, let the  
21 premises go. As a result, we've since filed the appropriate  
22 notice.

23 Judge Saylor's order had two interesting components  
24 to it: One, if someone wanted to object, they had to identify  
25 specifically what it is they wanted to preserve; and, two,

1 there was a requirement that their solution for that not  
2 require the trustee to continue to fund the preservation.

3 In accordance with the order, three parties filed  
4 objections or preservation requests. We would submit to the  
5 Court, none of them complied with Judge Saylor's order because  
6 they neither identified specifically what they wanted to  
7 preserve, nor did they indicate how they were going to pay for  
8 it.

9 We started talking to those parties in an effort to  
10 resolve it by agreement. They all indicated that, Well, we  
11 really would like to see the premises and maybe after we see  
12 them -- some said, if we just get to see them, we'll accent to  
13 the order.

14 Proving that no good deed goes unpunished, we agreed  
15 to let them all tour the premises, to video the premises.  
16 Other people stepped forward and said, Well, we didn't file a  
17 preservation request, but we'll file a motion to file one  
18 late. So, you should let us see the premises.

19 So, ultimately six different parties got to see the  
20 premises for three hours apiece. Not surprisingly, after they  
21 did, no one agreed to withdraw their preservation requests.

22 We filed a response to the preservation requests just  
23 the other day in front of the Court. Our request is the same.  
24 We believe we've preserved the relevant evidence, the ESI and  
25 the documents. We don't believe any of the equipment in the

1 premises or the premises themselves, more than two and a half  
2 years after the fact, has evidentiary value.

3 The Court, I'm sure, is aware of many crime scenes  
4 that have been returned to their natural state well before  
5 trial on the merits, whether it be Boylston Street or any  
6 other number of other crime scenes, potential crime scenes.

7 So, we would like to stop paying for the security and  
8 the heat and the phone and -- which is part of the security  
9 system, and the insurance, and we would like to get what we  
10 can for what's left there and preserving, like I said, the  
11 documents and the ESI.

12 The other thing that we did try to facilitate was --  
13 PSC was there for four days, took video through our efforts  
14 and working with the PSC. Those videos remain available to  
15 the folks who raised the preservation requests.

16 So, our view is it's simply time. It's time to allow  
17 the trustee relief from the preservation order to sell what he  
18 can sell and to give up the premises.

19 THE COURT: What's the cost -- monthly cost of the  
20 maintaining?

21 MR. GOTTFRIED: My understanding -- and this is an  
22 approximation -- approximately \$5,000, \$6,000 a month, your  
23 Honor, between the various out-of-pocket things that we're  
24 paying.

25 THE COURT: What is the estimate on the value of what

1 you can get rid of?

2 MR. GOTTFRIED: I don't know for sure. The crimper,  
3 in particular, is unused and in shrink wrap. I've been  
4 told -- I'm not representing this -- that it could be -- might  
5 have been new worth maybe seven figures. So, our hope is that  
6 there'll be at least some value and at least it will be an  
7 expense that we are no longer paying.

8 MR. BRACERAS: Your Honor, if I could be heard on  
9 this issue? Mr. Gottfried --

10 THE COURT: For the record, this is Mr. Braceras for?

11 MR. BRACERAS: UniFirst. Thank you, your Honor.

12 Mr. Gottfried just filed his motion or reply, I  
13 believe, two days ago, and if the Court permits, we would like  
14 perhaps a week to respond to that. I think that this is  
15 something that perhaps also can be referred to Magistrate  
16 Judge Boal.

17 THE COURT: Well, what's the problem? Why can't they  
18 get rid of the stuff?

19 MR. BRACERAS: The problem -- I don't think there is  
20 a problem and, in fact, Mr. Gottfried has misstated many of  
21 the facts here.

22 The fact is he could sell the crimper and he could  
23 close down the laboratory, the pharmacy, as far as we're  
24 concerned, but during our tour of the premises, we found --  
25 there were, you know, hundreds of pages and pages of hard

1 documents scattered throughout the offices, including in Mr.  
2 Cadden's office. Some of these papers, just by skimming  
3 through them on our tour, are plainly relevant to the  
4 litigation. In any civil discovery these would be papers that  
5 would have to be produced, have to be preserved and produced.  
6 There are also a lot of computers there. There are video  
7 cameras.

8           So, we did, in fact, provide by -- I think it was by  
9 email -- maybe it was less formal than Mr. Gottfried would  
10 like, but we provided by email a request to Mr. Gottfried's  
11 colleague, Mr. Johnson, and we said, Look, we're not  
12 interested in preserving the crimper. We're not interested in  
13 preserving the rest of the premises. All we want is copies of  
14 all of the documents that are in the building, copies of the  
15 hard drives, copies of the video cameras that -- as your Honor  
16 is aware, the videos in this case are relevant and have been  
17 used by the PSC in their complaint. So, we want copies of  
18 those.

19           And we offered to pay for it. We said that our  
20 people would go in. They could have somebody watching us. We  
21 will pay for people to go in. We'll have a vendor. We'll  
22 hire a vendor to go in and make all the copies, do all the  
23 computer forensics and make those copies, copy any videos that  
24 are there, and that's all we ask for, and in any civil  
25 litigation we would be entitled to get that.

1           Now, in his papers that he just filed, there's sort  
2 of a remarkable statement where the trustee says that they've  
3 produced --

4           THE COURT: Excuse me.

5           What is the document you're referring to? Because  
6 the one that is listed in the agenda is an older document. It  
7 was not just filed.

8           MR. GOTTFRIED: 1308.

9           THE COURT: 1308?

10          MS. JOHNSON: That would be No. 5(e), your Honor.

11          MR. BRACERAS: It was filed on August 5th.

12          THE COURT: Okay.

13          MR. BRACERAS: So, in this document the trustee takes  
14 the position that he's preserved all the documents that he  
15 believes have evidentiary value, but in any civil litigation  
16 we're entitled to all the documents, and we saw that there are  
17 documents directly relevant to this case, and we will pay for  
18 it.

19          THE COURT: Assuming they get to do this, how long  
20 will it take to get it done?

21          MR. BRACERAS: To get a vendor in there, a week, two  
22 weeks.

23          MR. GOTTFRIED: Your Honor, I think we're -- the  
24 point that needs to be made is we're conflating preservation  
25 with production, and we're absolutely willing to preserve and



1 say we'll preserve the papers that are in the premises. And  
2 so, that's all we're asking. If it's not the loan papers, for  
3 example -- we want to get rid of the equipment. We want to  
4 get rid of the premises. We'll preserve the papers on the  
5 premises.

6 Production is something that should be addressed in  
7 discovery. There's a stay currently in place. And so, you  
8 know, our view -- and we say this in our opposition -- or in  
9 our responsive papers, is that this is about preservation.  
10 It's not about production. Production, there's always these  
11 motions filed, lifting the stay, and our motion to be filed,  
12 quite frankly, we've said on August 14th, which would govern  
13 that.

14 The only issue here is, can the trustee finally get  
15 rid of the premises? Can he start saving that money to the  
16 estate? And we're not getting rid of any papers. All the  
17 papers will be preserved. The issue is that more than two  
18 years after the fact, can we get rid of this stuff?

19 MR. BRACERAS: And, your Honor, on this point, is  
20 that the trustee can't have it both ways. They can't complain  
21 about the cost of preservation -- and we offered, we will pay  
22 to go in and just make copies of it. And then say, Hey, we're  
23 not going to produce it. We don't want to give you access to  
24 it.

25 So, if they're willing to preserve all the papers in

1 there -- and not just the papers, the hard drives, the video  
2 cameras, any videotapes in the video cameras -- then I think  
3 we can reach a resolution on this.

4 THE COURT: You represent who?

5 MS. GREER: Your Honor, Marcy Greer.

6 THE COURT: Could you please find a microphone and  
7 sit next to it?

8 MS. GREER: sure.

9 THE COURT: I'm sorry. Mr. Braceras spoke without a  
10 microphone, too.

11 MR. BRACERAS: I try to be loud enough, your Honor.

12 THE COURT: Well, I don't think that works.

13 Go ahead. I'm sorry, your name again?

14 MS. GREER: Marcy Greer for the Saint Thomas entities  
15 and the Ascension parties.

16 I just want to give the Court a little bit of  
17 context. This process has been very rushed from our  
18 standpoint. We were told -- we filed -- we sent a  
19 preservation notice and said we don't even know what we're  
20 asking to preserve because we've never been on the premises.  
21 We've never had access to the videos. We have never had  
22 access to the photos. It's been a crime scene that we have  
23 been prohibited from getting into.

24 We were given a very short timeframe and said, You  
25 can come up on one of two days and bring whoever you want.

1 This is your one chance to get in there. And so, we had to  
2 scramble to get there by July 7th. We did not get any of the  
3 photos or the video that the PSC took in realtime after it  
4 happened until after -- we got some of the photos -- because  
5 they were held up in a firewall. So, we didn't actually see  
6 them. We just got the videos. So, we have not had time to  
7 fit everything together.

8 In addition to the things that Mr. Bracer has  
9 described, there are pieces of equipment that we are trying to  
10 piece together and put together with the video that we got  
11 from the PSC and we need a little bit of time to go through  
12 that so that we can make a proper preservation request that is  
13 very specific in detail.

14 It may be that we can resolve all of this, but I  
15 don't think that we need a fire drill and a decision today so  
16 that they can sell the property, considering how rushed this  
17 process has been. We need a little bit of time to --

18 THE COURT: How much time?

19 MS. GREER: -- fit the pieces together.

20 THE COURT: How much time?

21 MS. GREER: What do you think?

22 MR. SCHRAMEK: Your Honor, Adam Schramek, also for  
23 Saint Thomas and Ascension.

24 Your Honor, the problem is with the bankruptcy stay  
25 in place, we have no discovery from NECC. No discovery --

1 THE COURT: How much time?

2 MR. SCHRAMEK: Well, we have the stay lifted and then  
3 60 days to take discovery of the affiliated parties to see  
4 what we do need to know. For example, we were led to the  
5 backside where the recycling area is and there were, I'd say,  
6 100 plus banker's boxes of documents, and they said, There,  
7 that's part of your inspection.

8 I said, Well, what's in here? Has it been copied?  
9 It looked like, you know, sort of prescriptions. I don't know  
10 what this is. They said, We're not answering any questions.  
11 You have three hours. Here are 100 boxes for you to look at.

12 Well, what are these boxes? Have they been copied?  
13 We were told nothing.

14 We were walked through the remnants of a clean room,  
15 and they said, This isn't part of your tour. We just have to  
16 walk through here to get to the boxes. I said, Well, whose  
17 clean room is this? Is this UniFirst's clean room? Is  
18 this -- what is this? They said, You can't know. We can't  
19 tell you. This is all -- you got three hours.

20 So, Judge, until the discovery stay is lifted from  
21 the affiliated defendants and NECC so we have the context of  
22 what we're looking at so we can have our expert understand  
23 where was the MPA manufactured, should we be in container one,  
24 two or three? What were the issues? We have no discovery.  
25 We're told to go look at a clean room we have never seen

1 before for three hours and then I'm going to get rid of it  
2 all. Your Honor, we don't --

3 THE COURT: Should I have the next hearing in the  
4 clean room?

5 MR. SCHRAMEK: Your Honor, I think it would be very  
6 telling if we could have it in the clean room.

7 (Laughter.)

8 MR. GOTTFRIED: Your Honor, with all due respect to  
9 my brother --

10 THE COURT: Hold it one second, Mr. Gottfried.  
11 You're done?

12 MR. SCHRAMEK: Your Honor, I would just say that it's  
13 a little unfair, we believe, from our point of view, to be  
14 told, We're going to get rid of everything. We've not been  
15 able to talk to one affiliated defendant or NECC or obtain any  
16 discovery from them. So, they want to keep the stay and get  
17 rid of everything and at the back end tell us, Well, you  
18 should have looked at that previously. We have no context of  
19 what to look at other than a walk-through.

20 THE COURT: I assume that those who want time to do  
21 all of this are prepared to pay for the cost of keeping it?

22 MR. SCHRAMEK: Your Honor, I think that's a  
23 discussion that -- you know, that we can have. We feel like  
24 we've been wanting discovery for six months and they've been  
25 paying the costs without any concern. Let's lift the stay and

1 give us a few months with the stay lifted and then if we're  
2 unable to get our discovery, then we'll come in and talk about  
3 it.

4 THE COURT: We've gone from 60 days to a few months?

5 MR. SCHRAMEK: Well, your Honor, whatever the Court  
6 feels is appropriate we're willing to abide by. We just want  
7 some discovery first, then access to the clean room if we need  
8 it. We're just asking about preservation while we get the  
9 information from the defendants who have been subject to this  
10 stay, to know whether or not we need to get back in. What  
11 does our expert need to look at? How was the MPA being  
12 produced?

13 There was a giant bottling piece of equipment in one  
14 of the clean -- in one of the parts of the clean room. Was  
15 that there at the time? How was that used? What's the  
16 history there? We may need parts of that bottling equipment  
17 to be tested. We don't know because we haven't been able to  
18 have any discovery.

19 THE COURT: Okay. Got it.

20 Ms. Johnson, did you want to say something?

21 MS. JOHNSON: No, not yet.

22 THE COURT: Mr. Gottfried.

23 MR. GOTTFRIED: Just two things briefly.

24 So you have this in mind, I think it was three months  
25 ago we agreed that all of the informal discovery that we had

1 provided to the PSC, some 44,000 pages, could be made  
2 available to all the parties to the case.

3           So, to the extent that they haven't looked at that  
4 discovery, to the extent that they haven't digested it in  
5 three months, I don't know what to say about that, but they've  
6 certainly had access to it.

7           That discovery is not random discovery. That was  
8 discovery that was produced initially in response to a  
9 document request from the PSC and then, as I understand it,  
10 there were as many as 21 separate original requests the  
11 trustee responded to in a variety of different contexts,  
12 whether they be requests to facilitate mediation, or  
13 otherwise.

14           We then have gone above and beyond that. In addition  
15 to the discovery they had, we worked with the PSC to make sure  
16 that the video was available and that the stills were  
17 available. Then we agreed that they could come tour the  
18 premises.

19           The point is that -- he talked about testing  
20 equipment. This was a facility that was shut down, I believe,  
21 October 2012. I can't possibly imagine what benefit there  
22 would be to test a piece of equipment now at this late date.

23           We've talked about this with the U.S. Attorney. They  
24 have no objection to this. They've given all their notices to  
25 the people they think they need to give notice to. There is

1 no evidentiary value to anything that's there. This is just a  
2 burden on the estate and we should be -- we've preserved all  
3 of the ESI. We've indicated we've preserved that. We're  
4 preserving the documents, but the facility should be allowed  
5 to go and we should be allowed to sell the stuff.

6 THE COURT: So, you're proposing to preserve the  
7 documents where?

8 MR. GOTTFRIED: We would -- well, right now all the  
9 ESI, Harris Beach has that. They are the trustee's special  
10 counsel. They went in and collected that information and we  
11 would preserve it in a central warehouse. We're not going to  
12 throw any papers away. That's the one thing I want to be  
13 clear about. We're preserving the papers. This is about --

14 THE COURT: And the hard drives?

15 MR. GOTTFRIED: The hard drives we're not throwing  
16 away. Those will be available.

17 THE COURT: Okay. Thank you. I will think about it.

18 MR. GOTTFRIED: Thank you, your Honor.

19 MS. JOHNSON: If I may, your Honor.

20 THE COURT: Yes.

21 MS. JOHNSON: Thank you.

22 Three quick comments. The first is that the  
23 Plaintiffs' Steering Committee did not object to the trustee's  
24 notice relating to the preservation issues. We did attend the  
25 additional inspections when various defendants were present on



1 the premises.

2 The second point is that the -- we completely agree  
3 with the Court's suggestion that if there are additional costs  
4 related to the defendants' preservation concerns, that it may  
5 be appropriate for the defendants to shoulder those costs, and  
6 I particularly appreciate Mr. Bracer's offer to pay for  
7 collecting of that ESI. It sounds like it makes sense for  
8 that to be something that's considered in the ongoing meet and  
9 confer.

10 And the third, I understand, your Honor, that you  
11 intend to refer discovery matters to Judge Boal and we support  
12 that. It occurs to me that because some of these discovery  
13 concerns have been raised now in addressing this issue, it may  
14 be helpful for the Court to understand what was contemplated  
15 by the bankruptcy settlement agreements about discovery that  
16 may be taken from NECC.

17 So, I have a copy of the settlement agreement here.  
18 If I may hand that up to the bench.

19 (Attorney Johnson hands documents to the Court.)

20 THE COURT: Do you, by chance, have one copy for  
21 Judge Boal?

22 MS. JOHNSON: I do, your Honor.

23 THE COURT: Thank you.

24 MS. JOHNSON: There are two places in the agreement  
25 where discovery is addressed. I suggest that the Court turn

1 to the second pink tab, which says, "The terms of the MDL stay  
2 order, which is forthcoming," we discussed that earlier, "as  
3 requested by the MDL stay motion shall include" -- and I'll  
4 jump to Roman III.

5 "The permissibility of discovery against the estate  
6 parties, the contributors and the contributor and affiliate  
7 released parties, but only to the extent the discovery is  
8 relevant to the prosecution or defense of claims against  
9 defendants other than the estate parties, the contributors and  
10 the contributor and affiliate released parties."

11 I mention this specifically because I understand --  
12 and certainly the PSC has filed the motion to lift the stay of  
13 discovery as to the affiliated defendants -- that many parties  
14 are about to request from this Court additional discovery and  
15 I share with the Court what it is that has been contemplated  
16 and agreed to by the parties of the insider settlement  
17 agreement.

18 THE COURT: Thank you.

19 But how does one decide at this stage which of the  
20 documents are relevant? I guess we don't have to do that if  
21 we preserve all documents and the hard drives, and the like,  
22 right? Once they're preserved, then the discovery proceeds as  
23 it always would. And then the only question is whether any of  
24 the machinery or whatever the devices are, are in any way  
25 relevant to any defenses to the case. Is that about right,

1 Mr. Gottfried?

2 MR. GOTTFRIED: I think that's right. I think if you  
3 de-couple preservation from production. Production is  
4 something that would be dealt with in the context, presumably,  
5 of a specific request, assuming the Court were to enter the  
6 stay order in the context of this language in the stay order,  
7 which is precisely what we're going to be seeking, is that the  
8 Court enter an order in accordance with the settlement  
9 agreement, all points, A(2) and (3), and I think that can be  
10 done in the context of a specific request, but at this point  
11 we're saying it's really about preservation. Production,  
12 obviously, would be dealt with at a later date and that was my  
13 point about not conflating those points now.

14 THE COURT: I think I understand Mr. Gottfried's  
15 point of view, Mr. Braceras' and Ms. Greer's and Mr.  
16 Schramek's.

17 MR. BRACERAS: Your Honor, just one thing.

18 THE COURT: Mr. Braceras, I do know that you like to  
19 have the last word and, of course, you can.

20 MR. BRACERAS: Sorry, your Honor.

21 THE COURT: That's okay.

22 MR. BRACERAS: Is the videotapes, hard drives,  
23 documents and the videotapes...

24 MR. GOTTFRIED: Our motion in the footnote says we  
25 preserve whatever videotapes existed.

1 THE COURT: Okay.

2 MR. FERN: Judge, if I can. Frederick Fern.

3 I probably have more personal knowledge of what took  
4 place at or about the time of the recall since I was on the  
5 premises at the time.

6 My team went in and we preserved and collected all of  
7 the ESI from the main computers, from the PCs, from personal  
8 PDAs that were available. All of that was preserved and  
9 collected.

10 Though Mr. Braceras may have seen towers of  
11 computers, there's no hard drives in those computers. We made  
12 forensic copies which are in my database. About ten days  
13 thereafter the federal agents came in pursuant to a search  
14 warrant and executed that search warrant and took out all of  
15 the hard drives. They're in their possession. As to the  
16 videotapes --

17 THE COURT: Do you have copies of them?

18 MR. FERN: We made copies before they were taken,  
19 Judge, and pursuant to those copies is how we've been able to  
20 produce the 44,000 pages of documents that we have produced  
21 during informal discovery over the last 20 months or so.

22 As to the videotapes of the surveillance tapes, they  
23 were on a 30-day loop. Anything prior to 30 days was  
24 automatically erased. We have the 30 days from about October  
25 5th or so through September 5th of 2012. We've preserved

1 those, collected those, and those are in our database.

2 THE COURT: 30 months' worth?

3 MR. FERN: 30 days' worth, Judge.

4 THE COURT: You said from October --

5 MR. FERN: From October 2012 to September 2012. So,  
6 a month going back. So, to do it right, from September  
7 through October 2012, we have 30 days of videotape that were  
8 still viable at the time we went in and did the preservation  
9 and collection.

10 There is -- going in and looking at the equipment,  
11 Judge, there is nothing in the same condition as it was in  
12 October of 2012. There's been no air conditioning. There's  
13 been no vent. There's been no negative air pressure. No one  
14 has been working in there. So, it's fair to say that there's  
15 nothing in the same condition, which is a similar argument  
16 that Magistrate Boal heard back in Christmastime of 2012, when  
17 we -- when the PSC wanted to do their inspection and the  
18 Magistrate, in her infinite wisdom, gave them a four-day  
19 inspection with videos, experts, drilling, and the PSC took  
20 whatever they wanted to do at the time.

21 It's fair to say that the evidence they collected  
22 back then is a much fairer representation of what the clean  
23 room looked like at the time of the alleged negligence than it  
24 does 20 months later, with no one being in there.

25 It's very -- the rhetoric I'm hearing from the people

1 in the room, Judge, to what end? There's no doubt that there  
2 was contamination which emanated from the clean room back in  
3 September -- or the summer of 2012. Going in now and forcing  
4 the trustee to continue to preserve either the equipment or  
5 anything else in the clean room is just -- I don't understand  
6 to what end and to what purpose is it going to serve. Is it  
7 going to help to defend their case? Is it going to help to  
8 prosecute their case against NECC? I don't understand. I  
9 understand the lawyers' need to gather everything that they  
10 can and not take no for an answer, but I think the Judge --  
11 the Court here has to take that under consideration as to what  
12 -- the cost of it, the effort to be gained and what's going to  
13 come out at the end. We have preserved everything that was  
14 viable back on September 28th of 2012, the day of the very  
15 first recall and what we have --

16 THE COURT: By "viable" --

17 MR. FERN: -- the Federal Government has.

18 THE COURT: By "viable" you mean everything that was  
19 not partially destroyed or disfigured, or what?

20 MR. FERN: Judge, when we were in there, this was a  
21 working environment. There were still employees on the  
22 premises.

23 THE COURT: But what does "viable" mean in this  
24 context?

25 MR. FERN: Anything that was available for us to

1 preserve and collect, we preserved and collected.

2 Now, as to documents that are still on the tables and  
3 desks there, Judge, I have not been there since Christmas of  
4 -- actually, December 22nd, 2012. I do not know what's still  
5 on the tables of those people.

6 If the Court orders and if the other parties are  
7 willing to pay for it, we can go back in. My team is familiar  
8 with the premises. I had 30 people there scanning documents,  
9 making forensic copies of ESI with -- if someone else is  
10 willing to incur the cost, we could go back in and finish  
11 whatever -- whatever material that's on the desks that the  
12 defendants saw during their recent inspections of the  
13 premises.

14 THE COURT: Okay. I will take the matter under  
15 advisement.

16 MR. GOTTFRIED: Thank you, your Honor.

17 THE COURT: That is the matters. There are a whole  
18 bunch of them.

19 Status of appeals, is there anything to report?

20 MS. JOHNSON: Yes, your Honor. There are currently  
21 three appeals pending before the First Circuit, all relating  
22 to orders of this Court transferring cases from state courts  
23 pursuant to bankruptcy jurisdiction.

24 The first of those is an appeal from Judge Saylor's  
25 original order on that transfer issue. I understand the

1 briefing on that will be completed soon, but there is not yet  
2 any oral argument scheduled.

3           There is also a second independent appeal from this  
4 Court's order more recently transferring some additional  
5 cases.

6           And, finally, there's a petition for mandamus. There  
7 is no briefing schedule set yet as to the second and third  
8 matters before the First Circuit, and it seems to be unclear  
9 at this point in time whether the First Circuit will wait and  
10 hear all three of those at the same time or whether it will  
11 take them as the briefing schedules become complete in turn.

12           THE COURT: Okay. Further status conferences. I  
13 think we have agreed on September 18th at 3:00 and October  
14 23rd at 2:00.

15           MS. JOHNSON: We would request, if possible, that we  
16 could schedule for November and December so that we have dates  
17 around the holidays.

18           MR. STRANCH: Your Honor, would it be possible to  
19 have that -- that other status conference after Thanksgiving?  
20 I've got a three-week trial starting the first of November and  
21 I know some other PSC members are going to be out of touch  
22 early in November as well.

23           THE COURT: I think that's a good idea probably, but  
24 then we should probably skip December. December comes in the  
25 middle of the --



1 COURTROOM DEPUTY CLERK URSO: Judge, Thanksgiving is  
2 the last week of November, November 27th.

3 THE COURT: So, we'll do it the first week of  
4 December.

5 MR. STRANCH: Perfect. Thank you, your Honor.

6 COURTROOM DEPUTY CLERK URSO: Okay. Judge, what are  
7 you looking at? We have another MDL coming in on Thursday,  
8 December 4th.

9 (Discussion off the record at the bench.)

10 MR. STRANCH: Your Honor, that's actually us on  
11 December 4. I'm already going to be here. I would love to do  
12 them both at the same time.

13 THE COURT: Is it Prograf?

14 MR. STRANCH: Yes, your Honor.

15 MS. JOHNSON: Yes, your Honor.

16 THE COURT: Can we do them both on the same day?  
17 Prograf won't take very long.

18 MR. STRANCH: No, it will not.

19 THE COURT: One at 2:00, the other at 2:30. This one  
20 at 2:30. This is December 4th?

21 COURTROOM DEPUTY CLERK URSO: This is December 4th,  
22 yes.

23 (Discussion off the record at the bench.)

24 THE COURT: Now, with respect to Part B, Paragraph 8,  
25 I propose that all motions that are ripe for hearing by

1 September 17th be heard on September 17th, and I would ask Ms.  
2 Johnson or somebody to give me a list of them maybe a week or  
3 so before so that I can prepare for the hearing.

4 MS. JOHNSON: We're happy to do that, your Honor. In  
5 fact, we had intended to file a list maybe next week  
6 identifying them. We can hold that a little so that we make  
7 sure that we capture everything that's ready. There is one --

8 THE COURT: And there was a misunderstanding by some  
9 counsel about hearing certain motions today. I do not recall  
10 having scheduled any motion hearing today. So, I didn't hear  
11 them. Although they asked if they can participate by  
12 telephone and I said that was fine. So, whatever needs to be  
13 heard please put on the list and we'll hear it.

14 MS. JOHNSON: Yes, your Honor. There is --

15 THE COURT: What that means is that Prograf will, in  
16 fact, have to take maybe five minutes or so, right?

17 MR. STRANCH: Yes. I'll be quick, I hope, your  
18 Honor.

19 MS. JOHNSON: Is that a pretrial conference?

20 MR. STRANCH: Final pretrial conference.

21 COURTROOM DEPUTY CLERK URSO: Yes.

22 MS. JOHNSON: Okay. There is one matter, your Honor,  
23 and where counsel are present today and are prepared to argue,  
24 if the Court wishes, though I've spoken with both Ms. Gidaro  
25 who is counsel for the plaintiffs and Mr. Lang who is counsel

1 for the defendants, both of whom have agreed and have no  
2 objection to waiting until September if the Court would  
3 prefer.

4 THE COURT: I would prefer that because I'm not  
5 prepared. I haven't looked at the papers. So, I can't really  
6 participate in the argument at all. So, I would prefer that  
7 and I thank counsel for their consideration. Okay.

8 MS. JOHNSON: The only other --

9 THE COURT: Any motions that do not require hearing,  
10 let me know about them and we'll just do them in the normal  
11 course as soon as they're ripe. I mean, I can't imagine why I  
12 need to hear argument on motions to amend, for instance, but  
13 maybe. Whatever you decide, I will accept.

14 MR. STRANCH: Your Honor, the motion to amend, we  
15 think that there is a good chance that that may actually be  
16 able to be resolved and be basically assented to.

17 THE COURT: That's fine.

18 MR. STRANCH: That may not be something that you need  
19 to worry about anymore.

20 THE COURT: Now, is that it on the -- on Paragraph 8?

21 MS. JOHNSON: That takes care of, your Honor, 8, yes.

22 THE COURT: Now, with respect to 9, I have received  
23 not an agreed proposal, but two separate proposals. I will  
24 review them and I will decide which one I go with or how I try  
25 to assimilate the two of them into one.

1 MR. COREN: Thank you, your Honor.

2 THE COURT: So, that's Paragraph 9(a).

3 9(b) is the PSC's motion for leave to file reply,  
4 which is allowed. It is Document No. 1290.

5 And Paragraph C, a joint motion of the unsecured  
6 creditors to file a sur-reply, Docket No. 1293, and that is  
7 allowed as well.

8 Paragraph 10, the trustee's motion for entry of a  
9 supplemental order transferring an additional case and related  
10 thereto, I think, is Insight Health's motion for entry of a  
11 supplemental order transferring additional personal injury  
12 cases. The first one of these was 1252 and the second, 1300.  
13 Is there any opposition to either of these?

14 (No response.)

15 THE COURT: So, they'll be allowed. They are  
16 allowed.

17 11 is discovery motions, which, as I previously  
18 indicated, I would all refer to Judge Boal.

19 12 is the entry of a case management. It is called,  
20 "Entry of Case Management Order Regarding Virginia Matters,"  
21 No. 1188, and an opposition.

22 What is not clear to me is that, as I read the motion  
23 for entry of a case management order, it is simply an order  
24 that would allow use of already-produced discovery by all  
25 parties who are coming in. Whereas, Insight appears to regard

1 it as something all together different, and I'm not exactly  
2 sure why there is such a difference. If anybody wants to  
3 address it, I'm happy to hear it.

4 MR. FENNELL: Your Honor, this is Patrick Fennell for  
5 the Plaintiffs' Steering Committee.

6 THE COURT: Okay.

7 MR. FENNELL: I'll be happy to speak to that.

8 THE COURT: I mean, tell me whether I'm correctly  
9 interpreting the order as PSC has described it.

10 MR. FENNELL: Right. The scope of the original case  
11 management order that the PSC asked for in its June motion is  
12 a little bit broader than just discovery. It also addresses  
13 some orders that were entered by the state court in a couple  
14 of cases that were -- spent a lot of time in state court  
15 before being either resolved or transferred into the MDL.

16 So, in that -- in our motion -- in the PSC's motion,  
17 we have asked the Court to issue an order ruling that the  
18 discovery in those two cases, those two state court cases, can  
19 be spread across all of the Virginia cases. So, the discovery  
20 is the one issue, but the other issue is rulings on certain  
21 things, motions -- dispositive motions and those kinds of  
22 things.

23 THE COURT: So, Insight is correct that, in fact, the  
24 motion asks for more than the opening of discovery to other  
25 cases that are coming into this case?

1 MR. FENNELL: It is more than just discovery, yes,  
2 your Honor, but --

3 THE COURT: Is there objection to the discovery  
4 portion of the PSC's motion?

5 MR. FENNELL: I'm sure that Mr. Busch can speak to  
6 that, your Honor.

7 On a more immediate concern, though, is the filing  
8 that the PSC filed yesterday asking the Court to schedule that  
9 motion for oral argument and, if I may, your Honor, I would  
10 like to provide the Court a little bit of background as to why  
11 it is urgent, in our view, that that motion be heard soon.

12 The Virginia plaintiffs' attorneys, representing  
13 about 152 plaintiffs, do have claims against Insight Health  
14 Corporation and some other Virginia defendants are moving very  
15 rapidly toward a mediation. We've agreed on a schedule.  
16 We've agreed on a location. We have had co-mediators,  
17 Professor Green and a retired judge, Stanley Klein from  
18 Virginia, working with us for several weeks, now, preparing  
19 for this mediation, and there is an issue that the PSC is  
20 concerned about, because it has to do with the discovery issue  
21 that is raised in our motion for case management order and  
22 that is this:

23 The plaintiffs in Virginia have requested that the  
24 discovery which is the subject of the PSC's motion -- case  
25 management order be shared with the plaintiffs simply now for

1 the time being just for the purposes of conducting this  
2 mediation, and Insight's position on this is that it does not  
3 want that discovery shared with all of the plaintiffs or even  
4 the mediators for the purposes of conducting that mediation,  
5 and there are a lot of Virginia plaintiffs and their counsel  
6 who are very concerned and the PSC is concerned that without  
7 full access to that discovery, the mediation is very, very --  
8 it's on very tender ground. Its chances of success will be  
9 minimal, if there's any at all, if we even get to mediation.

10 So, the PSC is concerned and has requested in the  
11 motion, in the document that it filed yesterday, that we  
12 schedule oral argument for the purpose of getting an order  
13 entered on the discovery issue soon. We are scheduled to  
14 begin our mediation on September 11th and we would like to  
15 have oral argument in time for the Court to make a ruling on  
16 the discovery issue so that it can make a difference in this  
17 mediation.

18 THE COURT: What is the docket number of the most  
19 recent filing?

20 MR. FENNEL: There was a filing yesterday, Docket  
21 No. 1311 --

22 THE COURT: Okay.

23 MR. FENNEL: -- which was the request for oral  
24 argument and it was also styled as a "supplemental memorandum  
25 in support," and then today we filed a declaration from Scott

1 Sexton, who was one of the Virginia attorneys, in support of  
2 that filing yesterday.

3 THE COURT: Does anybody wish to be heard on behalf  
4 of Insight?

5 MR. BUSCH: Thank you, your Honor. Again, Stephen  
6 Busch for Insight Health Corp.

7 And, first, Judge, what is going on right here with  
8 the filing of this supplemental brief yesterday -- which, by  
9 the way, was filed after I was already at the airport on my  
10 way up here and I think Mr. --

11 THE COURT: How much time do you want to file a  
12 sur-reply or the sur-sur, or whatever, reply?

13 MR. BUSCH: Your Honor, I think the real issue before  
14 the Court on this is the bootstrapping of a dispute over the  
15 exchange of mediation materials to a preexisting motion for a  
16 case management order, and that's the real issue.

17 THE COURT: Well, what is it that you object to in  
18 the so-called case management order?

19 MR. BUSCH: Well, one thing --

20 THE COURT: If, in fact, it was as I thought it was,  
21 simply a request to make available existing -- produce  
22 discovery to new parties, would you object to that?

23 MR. BUSCH: Judge, I think your question is the exact  
24 reason I don't think this matter is teed up appropriately  
25 before the Court.



1           We have been in touch with Professor Green. He has  
2           offered to work with the parties to resolve the exchange  
3           mediation materials. We have offered dates for next week to  
4           do that. I haven't seen any of the plaintiffs who have  
5           declined to take him up on that opportunity, and our view is  
6           that we should work this out with the mediator, like you do  
7           with any other issue, by exchanging information. I want the  
8           record to be very clear that we have agreed that any  
9           information that was not subject to a protective order and  
10          could be shared should be shared with the plaintiffs and we  
11          have encouraged them to do that.

12           What this really is, your Honor, is an effort to set  
13          aside a protective order in state court and we think there  
14          needs to be a record and a separate argument of that and we  
15          think if we don't work it out with Professor Green next week,  
16          that they ought to file a motion to set aside the protective  
17          order in the state, not filed in state court, but to set aside  
18          the protection of what was filed in state court.

19           We want to have a successful mediation, just like  
20          they do. We put a lot of resources into this. We've  
21          indicated that they can share the discovery that was taken in  
22          these cases that is not subject to a protective order. If  
23          they think there is information that is subject to a  
24          protective order that they want access to and we don't work it  
25          out with Professor Green, they should file a motion. They

1 shouldn't try to bootstrap it on a case management order.

2 And I would also add, Judge, that we set up a  
3 briefing schedule in this case management order. We gave them  
4 an opportunity to file a reply, which is not permitted by  
5 these local rules. They filed this document last night,  
6 inconsistent with what that order was that your Honor entered.

7 And I should finally say that there has been no meet-  
8 and-confer on this issue and I don't know if that means that  
9 the PSC thinks that the local rule requiring meet-and-confer  
10 doesn't apply at all or just doesn't apply to them.

11 THE COURT: Let me just be clear that I understand  
12 the issue. Is the issue only such discovery as is subject to  
13 a state order -- protective order? Is that the only issue?

14 MR. BUSCH: Your Honor --

15 MR. FENNEL: For the mediation it is, your Honor.

16 Mr. BUSCH: Your Honor, I think that you've already  
17 smoked out the fact that the case management order raises a  
18 whole bunch of different issues.

19 THE COURT: I didn't smoke that out. Insight says  
20 that, but, as I read the original order of the PSC, it was --  
21 the original motion, it was a motion to allow discovery that  
22 had been produced heretofore to be made available to other new  
23 parties who are coming into the case.

24 MR. BUSCH: And, your Honor, we've already  
25 committed --

1 THE COURT: Let me just finish.

2 So, if that is the issue, then I don't see what the  
3 problem should be. Then you have narrowed the issue somewhat  
4 by saying that you do not object to the production to new  
5 parties of all discovery except that which is subject to a  
6 state protective order; is that correct?

7 MR. BUSCH: That is correct. And we put that in  
8 writing to the Virginia plaintiffs and the Plaintiffs'  
9 Steering Committee. We said --

10 THE COURT: So, at the moment you don't object to  
11 their turning over -- to allowing their motion, as I  
12 understand it, to allow them to turn over materials that were  
13 produced for the then-existing parties to any new parties so  
14 long as it's not subject to a protective order?

15 MR. BUSCH: That is correct.

16 THE COURT: And there is an issue with respect to the  
17 protective order that you say that Eric Green is trying to  
18 work out with the parties?

19 MR. BUSCH: That is correct.

20 THE COURT: Do the plaintiffs agree that's the case?

21 MR. FENNEL: Yes, your Honor. We're happy to try  
22 and work this out with Insight. We've been working on this  
23 issue now pretty hard for --

24 THE COURT: Are you talking about the same issue as I  
25 understand it?

1 MR. FENNELL: Absolutely, your Honor.

2 THE COURT: Okay.

3 MR. FENNELL: And all the PSC is requesting right now  
4 is in the event that we cannot work this out through Professor  
5 Green or any other manner, we would like to have oral argument  
6 on the issue of whether this discovery --

7 THE COURT: Okay.

8 MR. FENNELL: -- should be made available to all of  
9 the plaintiffs in Virginia for this mediation.

10 THE COURT: I suggest that you let me know if you  
11 break -- if the discussions with Mr. Green -- Professor Green  
12 break down. You'll file a motion. I'll hear you. And that's  
13 fine.

14 But the only issue is discovery previously produced  
15 that is subject to a protective order and whether that should  
16 be turned over to the new parties, right?

17 MR. FENNELL: For purposes of preparing for this  
18 mediation, yes, ma'am.

19 THE COURT: Okay. Well, that's all we're talking  
20 about.

21 MR. BUSCH: And, your Honor, to be clear, on one  
22 point --

23 THE COURT: I suppose once it's produced, if the  
24 mediation fails, everybody has it, right?

25 MR. FENNELL: Right.

1           The original request for the case management order --  
2       we did request some rulings on some orders that came from the  
3       state court. That's not important for purposes of conducting  
4       this mediation.

5           THE COURT: At the moment we don't worry about it.

6           MR. FENNEL: Right.

7           MR. BUSCH: And, your Honor, to be clear on one  
8       particular point, while we certainly told --

9           THE COURT: Every time I think it's clear and you  
10      tell me that there's something else that needs to be discussed  
11      for clarity, I failed.

12          MR. BUSCH: Well, since there hasn't been an argument  
13      on the motion, the specific relief in the form in which they  
14      requested --

15          THE COURT: We're not doing that. We're narrowing it  
16      down now and we understand that there's no problem in turning  
17      over any discovery to new parties that is not subject to a  
18      protective order and that the discovery that is subject to a  
19      protective order will be worked out with Eric Green. To the  
20      extent it cannot be, I will get a motion and hear it.

21          MR. BUSCH: Right.

22          And the point I wanted to make, Judge, is that the --  
23      I don't want to use the term "lead" because they've been in  
24      this the longest, but the Gentry Locke Rakes & Moore law firm  
25      had the first case that was resolved. They have 18 of these

1 cases. They've taken most of these depositions. They were  
2 the authors of the protective order and --

3 THE COURT: They want to get paid?

4 MR. BUSCH: -- at least the first one is -- we have  
5 told them repeatedly they are permitted to share information  
6 that's not protected and it should be done by them at their  
7 expense and they shouldn't try to shift that onto my client.  
8 I just want to be clear on that.

9 THE COURT: I understand. I knew it had to do with  
10 money.

11 Okay. So, that takes care of Paragraph 12.

12 13, motions for extension of time. I don't think we  
13 really have any major issues on that, do we?

14 MS. JOHNSON: No, your Honor, I do not believe so.

15 I will note on those, though, for the first time  
16 there is an opposition to an extension of time. If you look  
17 at No. 13(iii), there is an opposition to that request for  
18 extension of time, and I believe that counsel on that matter  
19 are either present in the courtroom or available by phone, if  
20 you would like to speak with them.

21 THE COURT: Are they here? Are they on the phone?

22 Oh, you're here.

23 MR. WALKO: For the defendants who oppose, we rest on  
24 the briefs unless the Court would like to hear.

25 Matthew Walko for defendants Hahnemann University

1 Hospital and Tenet HealthSystem.

2 THE COURT: There's a serious objection to an  
3 extension of time?

4 MR. WALKO: Yes, because it relates to a prior motion  
5 that is waiting decision having to do with the request for  
6 withdrawal of plaintiffs' counsel. The determination of that  
7 motion will make a difference as to what you resolve in the  
8 extension of time. All we ask is that the Court address it  
9 and if it grants any relief, that a date certain be indicated.

10 THE COURT: Okay. I'll decide it.

11 Dispositive motions, we've talked about those. You  
12 will give me the list of those that are ready, I guess about a  
13 week before we do them.

14 MS. JOHNSON: Yes, your Honor.

15 THE COURT: Motions already heard. We are working  
16 very hard on those. Unfortunately, they're complicated and  
17 it's a long opinion and you will have it, hopefully, next  
18 week.

19 Now, I thought I had ruled on the motion for the  
20 Tucker Law Group to withdraw in the Norma King case, but I  
21 think I haven't, right?

22 MS. JOHNSON: You have not issued a written order on  
23 that.

24 THE COURT: Okay. So, I will do that as well.

25 With respect to Part C.

1 MS. JOHNSON: The only thing in Part C that may be  
2 worth mentioning, your Honor, today would be No. 17, Insight's  
3 motion to strike 18 state court orders, and I only mention  
4 that because that relates to some of the other matters we've  
5 addressed earlier today.

6 THE COURT: Well, Ms. Johnson, what should I do with  
7 that?

8 MS. JOHNSON: Well, I was going to say you should  
9 deny it. I don't mean to be flip, your Honor.

10 (Laughter.)

11 THE COURT: I don't have the authority.

12 MR. BUSCH: Judge, I may speak to this. Steve Busch  
13 on behalf of Insight Health Corp.

14 We filed a motion and, obviously, as you know because  
15 you've spent a lot of time and are dedicated, while  
16 participating in a mediation process, we gave the opposing  
17 counsel an extension of time to respond and we're happy to  
18 give them a further extension of time to deal with this.

19 THE COURT: So, we should just ignore this motion  
20 until the mediation is finished.

21 MR. BUSCH: I think that would probably make a lot of  
22 sense, Judge.

23 THE COURT: Okay.

24 MS. JOHNSON: The reason I mention it, your Honor,  
25 really, is because there are three currently-pending motions



1 relating to the Insight matters that may sound like discovery  
2 matters, but may be things that your Honor chooses. Those  
3 would be numbers -- agenda No. 12, PSC's motion for entry of  
4 case management order. Agenda No. 17 --

5 THE COURT: Well, that one may be related to the  
6 mediation. So, I think that one should proceed as we decided  
7 before.

8 MS. JOHNSON: Yes, your Honor.

9 THE COURT: But this one we're talking about now, we  
10 should ignore until the mediation is done, hopefully,  
11 successfully, in which case, I don't have to do anything with  
12 it.

13 MS. JOHNSON: Yes, your Honor, we agree with that  
14 one.

15 THE COURT: Okay.

16 MS. JOHNSON: The only other matter related to -- the  
17 motion to amend related would be No. 3(b), which we discussed  
18 previously.

19 THE COURT: Okay.

20 MR. BUSCH: Judge, there's, likewise, No. 22, which  
21 is Insight Health Corporation's motion for reconsideration  
22 that has to do with the request for admissions in the state  
23 court and a partial summary judgment and I think, likewise,  
24 that matter could be continued to the backside of the  
25 mediation.

1 THE COURT: That's another one to be ignored.

2 MR. BUSCH: Not to be ignored, necessarily, but  
3 perhaps to be put off for another day.

4 THE COURT: Is there anything else that we need to  
5 talk about today that is not on the agenda?

6 (No response.)

7 THE COURT: As always, I thank you for your help and  
8 we will meet again on September 17th, those of you who have  
9 motions, and on the 18th, those of you who do not.

10 MS. JOHNSON: Thank you, your Honor.

11 MR. STRANCH: Thank you, your Honor.

12 (Adjourned, 3:37 p.m.)

13

14 C E R T I F I C A T E

15 I, Catherine A. Handel, Official Court Reporter of the  
16 United States District Court, do hereby certify that the  
17 foregoing transcript, from Page 1 to Page 58, constitutes to the  
18 best of my skill and ability a true and accurate transcription of  
19 my stenotype notes taken in the matter of No. 13-md-2419-RWZ, In  
20 Re: New England Compounding Pharmacy, Inc., Products Liability  
21 Litigation.

22

23 August 10, 2014  
24 Date

/s/Catherine A. Handel  
Catherine A. Handel, RPR-CM, CRR

25